No. 95-8836

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ELLIS WAYNE FELKER,
Petitioner

v.

TONY TURPIN, Warden,
Respondent

On Writ of Certiorari to
the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION ON BEHALF OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The National District Attorneys Association is the sole organization representing local prosecuting attorneys across the United States. Since its founding in 1950, the Association's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all citizens. NDAA members are responsible for the vast majority of criminal prosecutions in this country, and commonly represent the government when convictions are challenged in federal habeas corpus petitions. The Association has longed shared the concern that delayed, repetitive collateral attack on criminal judgments erodes the fundamental notion of finality: that criminal defendants may actually be in jail not because a judge or lawyer made a mistake, but because the criminal is guilty, and should take responsibility for his conduct. NDAA therefore has a compelling interest in the outcome of this case.

This *amicus curiae* brief is filed with the written consent of all parties, in accordance with Supreme Court Rule 37.3(a).

SUMMARY OF ARGUMENT

This case concerns one aspect of the 1996 amendments to the federal habeas corpus statute. Under the new law, a state prisoner wishing to file a second or successive petition must first secure authorization from a panel of court of appeals judges, and may not seek certiorari review in this Court of the panel's decision. That provision, along with other changes to the habeas act, has spawned much academic debate. But the issues raised in this case are readily resolved by integrating the new provisions into the existing statutory structure in

accordance with the plain language of the amendments and the basic rules of statutory construction.

The recent pre-filing limitations on review of second or successive petitions do not conflict with original review of habeas corpus petitions in this Court. The provision establishing these limitations, 28 U.S.C. § 2244(b)(3), states on its face that it applies only as to petitions "filed in the district court." § 2244(b)(3)(A). Thus, a second or successive petitioner seeking to file in the district court must begin by invoking the court of appeals pre-filing authorization procedure, which is not subject to further review. § 2244(b)(3)(E). A second or successive petitioner seeking this Court's review, in contrast, must invoke the original review process established by § 2241(a).

The two avenues of statutory review must, however, be read *in pari materia*, to give the fullest effect to both. Thus, while a second or successive petition may be initiated in either the court of appeals or in this Court, the two processes may not be invoked sequentially. The Congress obviously did not intend that § 2244(b)(3)(E), which precludes appellate or certiorari review of the court of appeals authorization decision, could be entirely circumvented by the simple expedient of filing a § 2241 petition seeking review of the very claims on which the court of appeals has denied authorization to proceed. Instead, the petitioner must elect one path or the other.

And the two processes, while parallel, must operate in a similar fashion. Thus, the same criteria to be applied by the court of appeals in deciding a motion for authorization under § 2244(b)(3) must also be applied if the second petitioner instead chooses to present his filing to this Court as an original matter under § 2241. By the same

token, if the Court chooses to exercise its discretion under § 2241(b) to remand an original petition to a lower court, proceedings thereafter must be subject to the same rules that govern second petitions originating in the lower courts.

With this understanding of the structure of the statute, the questions posed by the grant of certiorari here become fairly narrow: 1) the new provisions do not unconstitutionally limit this Court's jurisdiction, because they do not limit the Court's jurisdiction at all: the Court, under its original matter jurisdiction, may consider the very same legal issues reviewable in the lower courts; 2) the recent amendments — except for § 2244(b)(3), which is specifically limited to district court filings — are fully applicable to petitions filed as original matters under § 2241; and 3) the new statute does not conceivably suspend the writ of habeas corpus in this case, because it does not eliminate review that would otherwise be available.

ARGUMENT

The 1996 habeas corpus amendments provide a method for review of second or successive petitions in either the lower federal courts, under § 2244(b)(3)(E), or in this Court, under § 2241(a). Accordingly, the amendments

1) **accommodate the jurisdictional power of this Court under Article III;**
2) **harmonize with the statutory provisions for the filing of habeas corpus petitions as original matters in this Court; and**
3) **regulate habeas corpus consistently with the Suspension Clause.**

After almost a decade of debate, Congress has recently enacted significant changes to the federal habeas corpus act, through the passage of Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996. This legislation is a response to the concern that continual relitigation of criminal judgments jeopardizes the purposes for having a justice system at all. At some stage, the system must be allowed confidence in its convictions; the victims and perpetrators of crime, and the public at large, must know that a determination of guilt will be taken seriously. Accordingly, the Act embodies the societal determination — forged through unusually lengthy and intensive legislative review — of the appropriate balancing point between reliability and finality.

While the legislation contains many provisions for achieving this balance, only one applies in the present case. Petitioner sought to challenge his state court conviction by filing a second habeas corpus petition after the effective date of the Act. He did not initiate this process under 28

U.S.C. § 2241, which has long given this Court jurisdiction over habeas petitions filed as original matters. Instead, petitioner invoked newly enacted § 2244(b), a gatekeeping mechanism regulating review of such second or successive petitions.

That new provision, by its express language and the manner in which it interacts with § 2241, disposes of the questions raised by the certiorari grant here. Section 2244(b) creates a procedure for review of second or successive petitions in the lower courts, but does not abrogate this Court's power to review petitions filed as original matters under § 2241. Such original petitions, however, may not be used to obviate the requirements of the procedure established under § 2244(b). Thus, the second petitioner may elect either avenue of review — § 2244(b) or § 2241— but not both.

As a result, there is no constitutional or other impediment to implementing the newly amended habeas chapter. The second petition provision, § 2244(b), is not an unlawful infringement on this Court's jurisdiction; while it may slightly alter the form of some habeas litigation in this Court, the provision does not restrict the substance of the review relative to that available in the lower courts. Moreover, the provisions of the 1996 Act are easily incorporated into original matters filed under § 2241, thereby effectuating old and new sections consistently with statutory construction principles. Finally, the new legislation at issue here does not violate the Suspension Clause, as it leaves intact the Court's power of review over issues arising under the Act.

These conclusions follow from examination of the second petition limits contained in § 2244(b). The section

consists of two elements: a set of substantive limitations on the nature of claims cognizable in a second or successive petition filed by a state prisoner, and a set of procedural rules governing the method for litigating such a petition.

The cognizability standards appear in subsection (b)(2). A claim raised in a second or successive petition must be dismissed unless it is based on a new, retroactive constitutional rule, § 2244(b)(2)(A), or on new facts that could not previously have been discovered, and that would have resulted in a not guilty verdict but for constitutional error, § 2244(b)(2)(B).

The procedural rules appear in subsection (b)(3). Under subsection (b)(3)(A), a petitioner seeking to file a second or successive petition must first move for authorization from the court of appeals. Under subsection (b)(3)(B), the motion for authorization must be determined by a three-judge panel rather than a single judge. Under subsection (b)(3)(C), the motion may be granted only upon a prima facie showing that the claims to be presented in the successive petition meet the cognizability standards of subsection (b)(2). Under subsection (b)(3)(E), the panel's determination on this question is not subject to appeal or petition for writ of certiorari in this Court.

There is a distinction between the scope of these two provisions — the cognizability standards and the pre-filing authorization procedure — with significant implications for this case. Subsection (b)(2), concerning the cognizability standards, applies to second or successive petitions without restriction as to the court in which the petition will be litigated. Subsection (b)(3), concerning the pre-filing authorization procedure, in contrast, is a prerequisite only for second or successive petitions that will be "filed in the district court."

Thus, by its own terms, the pre-filing authorization procedure of § 2244(b)(3) does not apply to second or successive petitions to be filed in this Court, as original matters under § 2241. Such original matters are of course not "filed in the district court," and therefore do not require circuit court pre-approval. If they did, the court of appeals would in effect have the power to shut off review under § 2241, because the authorization process is unreviewable by operation of § 2244(b)(3)(E). The new legislation avoids such a barrier by exempting Supreme Court original filings from the authorization process. The Act is therefore compatible, rather than in conflict, with the long-standing provision for original filings in this Court.

At this point, principles of statutory construction operate to regulate further interplay between the new second petition provisions of § 2244 and the original matter provision of § 2241. Amendments to a statute must be read together with the previous, unchanged portions, as if all had been promulgated as one act. The purpose is to avoid conflict and give effect to both old and new provisions. N. Singer, Sutherland on Statutory Construction § 22.34 (5th ed. 1992). Thus, while § 2241 original filings in this Court are not subject to pre-filing authorization by the court of appeals, such original filings cannot be used as a means to avoid the 2244(b)(3) pre-filing procedure once invoked.

That, however, is exactly what petitioner here has attempted. He seeks two bites at the second petition apple — once before the court of appeals panel under the pre-filing procedure, and again before this Court pursuant to certiorari or original matter jurisdiction. If permitted, such a maneuver would obliterate § 2244(b)(3)(E), which explicitly precludes review of the panel's authorization decision. The only way to give meaningful effect to all

provisions is to put the petitioner to a choice. He may move for authorization before the panel or petition as an original matter before this Court, but not both.

In other respects, the two processes can easily be conformed. Although not explicitly incorporated into § 2241, the cognizability standards of § 2244(b)(2) are — unlike (b)(3) — not limited to petitions to be filed in the district court. Thus, all second petitions, whether initiated by a motion for authorization in the court of appeals or by an original filing in this Court, must be judged against those standards.[1]

If the petitioner chooses this Court's review, the Court may still exercise discretion under § 2241(b) to remand the petition to the district court rather than engage in merits review. Nothing in the new legislation circumscribes this discretion.[2] Once the case is remanded, however, it must be treated like other district court filings, subject to any applicable requirements, such as the pre-filing authorization procedure of § 2244(b)(3).

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[1] The importation of such requirements into § 2241 original petition practice is not a new development in habeas corpus law. The Court has specifically directed that petitions filed as original matters under § 2241 must meet the exhaustion doctrine of § 2254(b). Supreme Court Rule 20.4(a). Presumably, the Court would also apply other doctrines, developed through case law — e.g., abuse of the writ, McCleskey v. Zant, 499 U.S. 467 (1991), and procedural default, Coleman v. Thompson, 501 U.S. 722 (1991) — to § 2241 original petitions.

[2] There is one respect in which the 1996 Act arguably has an impact on § 2241(b). Section 103 of the Act amends Fed. R. App. P. 22(a) to require a court of appeals judge to transfer to a district judge any habeas petition filed as an original matter in the court of appeals. This provision, however, affects § 2241(b) discretion only for the court of appeals, not for this Court.

The net result of this integration of the new provisions with the old is that the habeas petitioner may, as in the past, initiate the review process in either the lower courts or in this Court. If he wishes to begin in the district court, he must first seek authorization in the court of appeals, from which no higher review will lie. If he wishes to begin in this Court, no pre-filing authorization is required, but he will be face the same cognizability standards as in the court of appeals, and the possibility of a remand.

With the new statutory framework established, the questions posed in the grant of certiorari are readily resolved.

The amendments at issue do not restrict the Court's jurisdiction in violation of Article III of the Constitution. No such restriction exists for the initiation of review of a second or successive petition. The petitioner may always invoke this Court's jurisdiction simply by electing to proceed with an original matter under § 2241 rather than a motion for circuit court authorization under § 2244(b)(3). The Court's original matter jurisdiction is discretionary review of the same nature as certiorari jurisdiction. Whether or not the Court chooses to address the merits, it retains the ability to examine § 2241 filings for important and recurrent issues. The fact that this review carries a different label (original matter rather than certiorari) or occurs at a different juncture (in place of rather than after court of appeals consideration) does not change the jurisdictional result. Thus, because the statute preserves the opportunity for this Court's review, there is no jurisdiction-limiting issue to resolve.

The recent amendments must apply to habeas petitions filed as original matters in this Court under §

2241. As discussed, new § 2244(b) can successfully be harmonized with § 2241.[3] As a matter of statutory construction, the broad language of § 2241 cannot be read as a means of escaping specific limitations provided elsewhere in the habeas corpus chapter.

The 1996 Act does not constitute a suspension of the writ of habeas corpus in this case. Any such contention would be a makeweight. This Court remains available under § 2241 to review any contention that claims meet the cognizability standards for second or successive petitions. See Swain v. Pressley, 430 U.S. 372 (1977) (substitution of remedies is not suspension of habeas writ). The only reason such a course is no longer open to petitioner here is that he instead elected a procedure, under § 2244(b), that on its face precludes review of the court of appeals authorization decision. The writ of habeas corpus cannot be considered suspended merely because the petitioner chose one litigation strategy over another, and now wishes to have it both ways.[4]

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[3] The same principles guiding that process also apply to other sections of the new statute not at issue in this case. The 1996 Act, for example, creates § 2244(d), which establishes time limits for the filing of a federal habeas petition following the completion of state court review. The filing deadline is not limited to district court filings, and would be rendered ineffective if not applied to petitions filed as original matters in this Court under § 2241.

[4] Of course, even a genuine suspension of review previously available under the habeas corpus statutes would not violate the Suspension Clause of Article I, § 9. The habeas statutes are not the embodiment of the writ referred to in the Constitution, Swain v. Pressley, 430 U.S. 372 (1977) (Burger, C.J., concurring); rather, they were promulgated under the authority of § 5 of the Fourteenth Amendment, to create a new remedy in the law for the protection of civil rights. The vicissitudes of statutory habeas review are not the equivalent of suspension under the Constitution.

Accordingly, the statutory scheme is valid and must be applied to petitioner's case. His certiorari petition contravenes § 2244(b)(3)(E), and so the grant of certiorari must be vacated. His habeas petition as an original matter, filed as it was following court of appeals review under § 2244(b)(3), is in derogation of § 2244(b)(3)(E), and so must be denied. Because no proceeding is properly before the Court, the stay of execution must be lifted.

CONCLUSION

For these reasons, the Court should vacate the grant of the writ of certiorari, deny the petition for a writ of habeas corpus, and vacate the stay of execution.

Respectfully submitted,

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